

## RESEARCH OUTPUTS / RÉSULTATS DE RECHERCHE

### Advertising for online gaming

Keuleers, Ewout

*Publication date:*  
2003

*Document Version*  
Publisher's PDF, also known as Version of record

[Link to publication](#)

*Citation for pulished version (HARVARD):*  
Keuleers, E 2003, 'Advertising for online gaming: click the mouse, lose the house', pp. 1-5.

#### General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

#### Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

« Advertising for online gaming »  
Click the mouse, lose the house

Ewout Keuleers

Attorney-at-law at the Bar of Brussels  
Researcher at the Centre for Computer and Law, CRID

**Casino Affiliate Convention Amsterdam**  
3 April 2003

[WWW.ULYS.NET](http://WWW.ULYS.NET)  
[Ewout.keuleers@ulyes.net](mailto:Ewout.keuleers@ulyes.net)

# Advertising?

- What is illegal offline, should be illegal online
- Specific regulation for some media
  - ❑ Written press, freedom to provide goods
  - ❑ TV & Radio:
  - ❑ Internet? IDTV? 3G?
- Specific regulation for traditional media does not apply, only general technology neutral regulation does

# Complex matter

- ❑ Diversity of regulators and competent authorities: EU, Member States, Decentralized regions, etc.
- ❑ Distinction between gaming specific regulation and regulation in the field of consumer protection and publicity, e.g. promotional games
- ❑ Diversity of gaming activities: no common definitions for lotteries and games of chance

➡ Complex set of applicable rules

➡ Case-by-case analysis

## **FIRST LINE OF DEFENSE**

# **The European Regulatory Framework**

# The European Regulatory Framework – Overview

## ☞ Article 49 of the EC Treaty:

- Freedom to provide services

## ☞ Directive 2000/31/EC on electronic Commerce

- Commercial Communications
- Applicable Law – Internal Market clause
- Safe Harbors – Responsibility

## ☞ Directive 2002/58/EC on privacy and electronic communications

- Commercial Communications
- Cookies and similar devices

## ☞ Directive 97/06 on Distance contracts:

- information to be provided

# EU Framework for commercial communications

## Electronic Commerce Directive

### ➤ **Concept of commercial communications**

“any form of communication designed to promote, directly or indirectly, the goods, services or image of person pursuing a commercial, activity”

### ➤ **Legal regime:**

- ❑ Article 6: Commercial Communication: Information to be provided :
  - ❑ The commercial communication must be identified as such;
  - ❑ The natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable
  - ❑ Promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

## EU Framework for commercial communications Electronic Commerce Directive

- **Article 7 Unsolicited commercial communication – SPAM**
  - ❑ Spam must be identified in a clear and unambiguous way, this from the moment of reception on
  - ❑ Service providers must respect opt-out registers
- **Article 16: Codes of Conduct or other self-regulatory instruments:**



## Advertising on the Internet: OPT IN – OPT OUT?

### ➤ Current Framework

- ❑ Directive 97/6/EC on Distance Contracts
- ❑ Directive 97/66/EC on privacy and telecommunications

### ➤ Double regime:

- ❑ OPT-IN : automated calling system and fax
- ❑ OPT-OUT: any other means of distance communication

# EU Framework for commercial communications

## Privacy Issues: Directive 2002/58/EC

---

### ➤ Unsolicited Communications: article 13:

- ❑ Principle: OPT IN: subscribers must give their prior consent:
- ❑ Exception: OPT-OUT if:
  - ❑ Existing commercial relationship
  - ❑ same natural or legal person
  - ❑ similar products or services
  - ❑ consumer is given the opportunity to refuse reception

### ➤ Cookies, Spyware, hidden identifiers and other similar devices

- ❑ legitimate purposes
- ❑ User must be informed of the installation, on the purpose: promotion of gaming activities?
- ❑ Users should have the opportunity to refuse to have a cookie
- ❑ User should receive in a user-friendly way information for refusing the installation

# Directive 2000/31/EC on electronic Commerce (I)

---

- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 (E-com Directive)
- Transposition before 17 January 2002 - Review before 17 July 2003
- Principles:
  - ❑ Objectives
  - ❑ Applicable Law – Internal Market Clause
  - ❑ Scope – coordinated field
  - ❑ Safe Harbors

# Electronic Commerce Directive - Objectives (II)

---

- To guarantee the free provision of Information Society Services
- To promote the development of e-commerce in the Internal Market
- To provide for and adequate legal framework
  - ❑ To build consumer confidence
  - ❑ To create legal certainty for business
  - ❑ To reduce legal obstacles and ensure that business opportunities can take full advantage of the Internal Market

## Electronic Commerce Directive – Applicable Law (1)

### Article 3: « *Internal Market Clause* »

#### ❑ Mutual recognition and rules of the country of establishment

*“Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.*

*Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State”*

- ❑ « Country of establishment »: Member State from where the economic activities are effectively pursued through a fixed establishment
- ❑ Derogations: general and on case-by-case basis

# Electronic Commerce Directive – Applicable Law (2)

## Derogations on a case-by-case analysis

---

### ➤ Principle

Member states can restrict the free provision provided that the adopted measure is: necessary for reasons of consumer protection, public policy and public order and must be proportionate to that objective

### ➤ Article 49 EC Treaty:

A Member State may not restrict the freedom to provide services from one Member State to another.

### ➤ Article 46, exception :

Restrictions may be imposed on grounds of public policy, public security or public health

### ➤ Jurisprudence EC Court: Schinlder, Läärä and Zenatti

- ❑ counter consequences of compulsive gambling and protect society at large
- ❑ organized crime
- ❑ reallocation of profits

## Electronic Commerce Directive – Applicable Law (3)

### conclusion

---

- Member States have a backdoor to restrict the provision of information society services, BUT have to follow the procedure
- Outcome of the Gambelli case

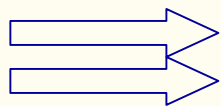
# Electronic Commerce Directive – Coordinated field (1)

## ➤ Horizontal Directive:

- ❑ Delivery of all Information society Services (ISS), this irrespective of their nature:
- ❑ “Constitution” for electronic Commerce in Europe

## ➤ ISS?: Directives 98/34/EC and 98/48 EC

- ❑« *Any service normally provided for remuneration, at a distance, by*
- ❑ *electronic means and at the individual request of a recipient of services* »
- ❑« *service* »: in the meaning of article 50 EC Treaty:
- ❑« *at a distance* »: parties are not simultaneously present
- ❑« *by electronic means* »: service is sent and received by means of electronic equipment
- ❑« *at the individual request of a recipient* »: a request proceeds the provision of the service



- No reason why online gaming services cannot be qualified as ISS
- notification of the regulation concerning online gaming activities

## ➤ Excluded from the coordinated field: article 1.5



## Electronic Commerce Directive – Exclusion of the coordinated field (2)

---

### ➤ Article 1.5.d :

*“the following activities of information society services :*

- gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.”*

### ➤ Consequence ?

- ☐ Just derogation from article 3 or complete exclusion ?
- ☐ National Jurisprudence: Bet-at-Home, Ladbrokes
- ☐ Commercial communications for online gaming activities?

## Electronic Commerce Directive – Exclusion of the coordinated field: What Lies ahead? (3)

---

### ➤ 17 July 2003 Review :

*“Adapting it to legal, technical and economic developments in the field of information society services, in particular with respect to crime prevention, the protection of minors, consumer protection and to the proper functioning of the internal market”*

### ➤ E-commerce Directive:

“EU Constitution” for the information society  
 Dutch Bill on casino games (WoK)

- Rise of the information society: ISS are highly mobile services
- Need for an adequate regulatory framework

## Electronic Commerce Directive – Exclusion of the coordinated field: What Lies ahead? (3)

---

### ➤ Internal Market Strategy for Services

### ➤ Directive 2002/38/EC on VAT and electronically supplied services

Annex L: « Supply of music, films and GAMES, INCLUDING GAMES OF CHANCE AND GAMBLING GAMES, and of political, cultural etc. »

### ➤ Jurisprudence of the European Court of Justice

- ❑ Schindler: opinion A.G. Gulmann principle of equivalence
- ❑ Gambelli, Ladbrokes ?and ????:

# Electronic Commerce Directive – Responsibility (1)

---

➤ Safe Harbors: Caching, mere conduit and hosting

❑ **Mere conduit** : Transmission

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission;
- (c) does not select or modify the information contained in the transmission

❑ **Hosting**: storage of information

- (a) Do not have actual knowledge of illegal activity or information and is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information

## Electronic Commerce Directive – Responsibility (2)

---

### ➤ Additional Safe harbors

- ❑ Member states can adopt additional safe harbors
- ❑ Spain: article 17 of the Act of 11 July 2002 (Ley 34/2002, BOE 166)

### **Safe harbor for linking and search engines IF**

- a) no actual knowledge that the activity or the information to which they refer or recommend users is illegal or that it damages the goods or rights of third parties liable to compensation, or
- b) If they do have such knowledge, they make efforts to remove or deactivate the link in question.

**SECOND LINE OF DEFENSE**

**APPLICABLE LAW AND COMPETENT  
JURISDICTION**

# Applicable Law and Competent Jurisdiction (1)

---

- ❑ Principle of territorial application of law
- ❑ Exception: extra-territorial application
  
- ❑ Article 5.3 of Convention of Brussels on civil non contractual liability
  - “Competent court is the court of place where the damage was suffered”
- »
- ❑ Theory of Ubiquité: Authorities can claim competence from the moment one of the constitutive elements of the act occurred on their territory
- ❑ Two theories: Yahoo v. Destination criterion

# Applicable Law and Competent Jurisdiction (2)

Yahoo.com (TGI Paris, 22 May 2000)

---

- ❑ Yahoo.com on-line auction of nazi products. LICRA and UEJF filed a complaint in France against Yahoo.com
- ❑ TGI: « ...*visualization in France of nazi objects and the possibility that a French internaut participates in the auction ... therefore Yahoo.Inc commits a fault on the French territory...damage was suffered in France so in application of art. 46 of the CPC the court is competent..... »*
- ❑ two territorial links
  - ❑ Accessible in France
  - ❑ A French plaintiff was shocked

➡ **French court is competent.**

- ❑ Is Pandora's box open?
  - ❑ universal competence
  - ❑ Conflict of underlying moral values:  
 A safe bet for success (UK) v. National Internet Gaming Industry (DK)



# Applicable Law and Competent Jurisdiction (3)

## Destination and foreseeable damage: The alternative?

---

### ➤ TGI Paris, 10 November 1999:

–«... In the first place objective parameters which can be controlled by the author of a website, should determine one's competence.... therefore it is advisable to apply the criteria of foreseeable damage instead of a criteria, following which every judge can declare himself competent..... »

### ➤ Objective parameters:

Top-level domain extension, language, currency, help desk, publicity, etc.

# Applicable Law and Competent Jurisdiction (4)

## CONCLUSION

□ Authorities will not encounter great difficulties when granting competence:

□ Examples:

□ Schindler: German based lottery, publicity in the UK

□ bet-at-home Case ( Germany)

□ Ladbroke's (Netherlands)

THIRD LINE OF DEFENSE

# MEMBER STATE Regulation

# Member States:

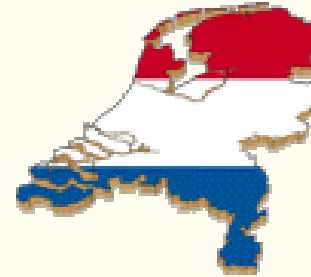
## Some Preliminary Remarks (I)

- Constitutional model: decentralized or centralized regulation
  - ❑ Gaming activities
  - ❑ Media: allocation of competences in the field of culture and audio-visual policy
  
- General principle for gaming publicity:
  - ❑ only publicity for duly authorized games is legitimate
  - ❑ Backdoor: criminal law must be interpreted in a restrictive manner
  - ❑ Escape qualification as a game of chance or lottery, by modifying your concept away from the constitutive elements of the legal definition

# Member States:

## Some Preliminary Remarks (II)

- **Market Law and Consumer Protection:**  
 General principles in the field of advertising and unfair business practices
  
- **Criminal law:**
  - ❑ marketing agencies can be considered as authors of or complice of a criminal offence IF they knowingly promote an illegal activity
  - ❑ Publicity for gaming activities can be considered as infringing the public order.



# The Netherlands

## ➤ **The 1964 Act on games of chance:**

Promotion of games of chance in the Netherlands without a license is forbidden.

## ➤ **Stichting Reclame Code:**

Code of Conduct for casino games and gaming machines (RKC)

- ❑ Purposes may not be other than a responsible participation and to incite one's interest
- ❑ May not stress the possibility of winnings
- ❑ May not give the impression that gaming is without risk
- ❑ May not be directed at vulnerable groups or minors
- ❑ May not be displayed at events of venues frequently visited by minors or other vulnerable groups

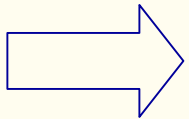
# The Netherlands - Recent Jurisprudence:

## ➤ Ladbrokes: Court of Arnhem, 27 January 2003 (De Lotto)

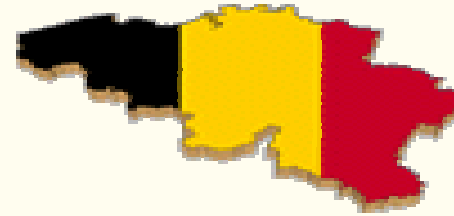
The 1964 Act on Games of chance subject the exploitation of games of chance to a license. Considering that Ladbrokes was not granted the required license, it may no longer offer its services to Dutch residents

## ➤ Casino Lux: Court of Utrecht, 27 February 2003, (Holland Casino)

The provision of gaming services to Dutch residents without being subject to any requirements is an unlawful advantage and therefore should be prohibited



Foreign operators must adopted online verification systems to block access to their website from the Dutch territory.



# Belgium:

## ➤ **Casino Games , 1999 Casino Act**

Promotion of non-authorized games of chance is an offence, even when the operation is established outside Belgium (§ 64, 1999 Casino Act)

## ➤ **Lotteries**

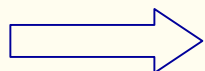
### ❑ National Lottery Act of 19 April 2002:

- ❑ monopoly to the National Lottery
- ❑ Modification of 24 December 2002: notification Directive

### ❑ Act of 31 December 1851 on lotteries

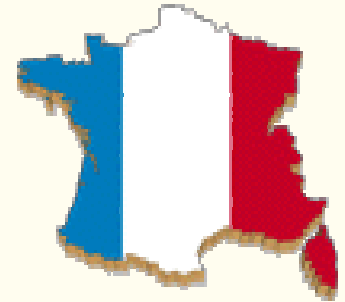
## ➤ **Article 23, 10° of the 1991 Consumer Protection Act**

- ❑ Publicity that incites the hope to win a product, service or other advantage by chance is forbidden:
- ❑ Exclusion:
  - ❑ legally authorized lotteries



**No publicity for authorized games of chance and casino games**





# France- Old regulatory framework

## ➤ The regulatory framework

- ❑ Games of chance: Act of 12 July 1983
- ❑ Casino operations: Act of 15 July 1907
- ❑ Lotteries: Act of 21 May 1836

## ➤ Application in an online environment?

- ❑ Casino and notion of “fixed establishment”
- ❑ Online gaming activities are subject to this legislation, thus a license is required
- ❑ Yahoo-case: universal competence

# France – Publicity :

## ➤ **Lotteries: article 4:**

Publicity for unauthorized lotteries is forbidden, this irrespective of the media used

## ➤ **Casino games and games of chance:**

- ❑ No specific dispositions for publicity
- ❑ General Regime of the French Criminal Code (§ 121-6, § 121-7)  
 “He who knowingly contributes to a criminal offence shall be punished as if he was the author of the offence”

# Germany

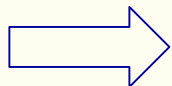


## ➤ **Federal Criminal Code, StGB**

- ❑ Organization of and participation in is considered as a criminal offence
- ❑ Games of chance: § 284, 285 and 287
- ❑ Lotteries: § 287
- ❑ Advertising: § 284, 4
- ❑ Gaming taxes are very high (80-90%)

## ➤ **Länder (16):**

- ❑ competence to derogate from the general prohibition and adopt their proper gaming policy



Fragmented legal landscape, case-by case analysis is required

## ➤ **Bet-at-home case**

# Austria



- Federal Act n°620
- ❑ Federal Government has a monopoly on all games of chance, unless formally excluded
- ❑ Exclusion
  - ❑ lottery games (§14): till 2004 the private undertaker OLG has a monopoly
  - ❑ casino games (§21): license for 12 casinos has been granted to CASAG

# Italy



- Italian Criminal Code: articles 718-722:
  - ❑ The organization of and participation in games of chance are criminal offences
  - ❑ Publicity for casino games or games of chance is not allowed
  
- Act n° 401 of 13 December 1989:
  - ❑ monopoly for CONI and UNIRE (sports competitions)
  - ❑ If you have a license, you can promote your activities



# Spain

➤ **Till 1975: Gaming sector centralized**

➤ **Spanish Constitution of 1978:**

The decentralized Comunidades Autónomas (19) have an almost exclusive competence in the field of gaming activities:

➡ Fragmented legal landscape, case-by case analysis is required

➤ **Comunidad Autónoma de Aragón**

❑ Article 12 of the Act of 28 June 2000

❑ Publicity for games is forbidden, this irrespective of the media used.

❑ Government has the competence to adopt a Decree derogating from this prohibition

❑ Decree n° 159/2002 of 30 April 2002: commercial lotteries and games

➤ **Lotteries: Public entities; LAE and ONCE**

# Portugal



- Decree-Law 422 of 2 December 1989 on casino games
  - ❑ License is required, 6 requirements
  - ❑ Advertising for gambling or casino games if forbidden
  - ❑ Advertising for venues on which casino games are organized together with other services (restaurant, shows, etc.) is allowed
- Advertising Code
  - ❑ approved by Decree-law No. 330 of the 23 October 1990
  - ❑ prohibits advertising for games of chance (§ 21)



# United Kingdom - Current framework

- **§ 42 of the Gaming Act 1968 and Gaming Board's**
- **Guidelines**
  - ❑ Advertising is possible but restricted
  - ❑ Classified advertisement: directed at a certain public
  - ❑ Factual information: name, address, logo and limited details about gaming facilities
  - ❑ Newspapers and magazines: A4 size
  - ❑ Online: passive website is not covered by the Guidelines, others OPT IN
  - ❑ Television: Independent Television Commission (ITC): Advertising Code
  - ❑ Advertising Standards Authority: CAP Code
- **Lotteries**
  - ❑ Lotteries and Amusements Act 1976 and Lotteries Regulations 1993
  - ❑ National Lottery Act 1993
  - ❑ Schindler - Millions2000 case



# Reform of Gambling legislation: The UK an E-gaming Hub?

- ❑ **Budd report of the Gambling Review Body**
- ❑ **DCMS's White Paper: A safe bet for success**
- ❑ **The Government's Proposals for Gambling: Nothing to Lose?**
  
- ❑ **Advertising for licensed gaming activities should be allowed**
- ❑ **Gambling Commission will issue an Advertising Code of Practice**

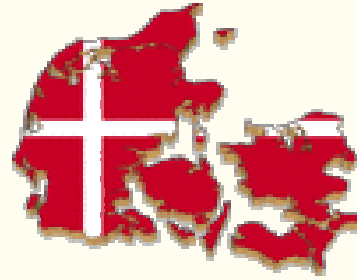


# Finland –Åland Islands

- Finish mainland
- Lotteries Act of 23 November 2001
  - ❑ Exclusive license granted to a organization that has a charitable or other non-profit purpose, applies to foreign lotteries if tickets are sold or supplied in Finland,
  - ❑ Läära - RAY
- Advertising: section 62: Prohibitions of running a lottery
  - ❑ « selling or supplying tickets for a lottery run without a licence required under this Act or promoting such a lottery by publishing or distributing advertising material or in any other similar manner;
  - ❑ selling or supplying tickets abroad and promoting such activity in the manner referred to in subparagraph 1, unless permitted under the legislation of the State or region in which the tickets are sold or supplied »

# Åland Islands

- ❑ 2001: PAF, Åland Islands Slot Machine Association
- ❑ Online operations were challenged in Court for infringing the Finnish monopoly
- ❑ Finish Supreme Court (30 August 2001), rejected the appeal
- ❑ Åland government may issue online gaming licenses, but the activities may not be promoted on the Finish mainland



# Denmark

- **National Internet Gaming Strategy, 18 June 2001**
- ❑ Maintain control over the gaming market and protect the monopoly
  - ❑ ISP's block access to foreign sites
  - ❑ Blocking of credit card payments, PBS
  - ❑ Regulate internet gaming
  - ❑ Rigid monitoring and certification process for licensed operators
  - ❑ International cooperation
- ❑ Proceedings have been initiated against media linking to or making publicity for foreign operators

# Sweden



- **1999 Casinos Act**
- **1994 Lotteries Act, as modified:**
  - ❑ August 2002: online gaming regulated  
Lotteries communicated by means of electromagnetic waves (§21)
  - ❑ Publicity, §38:
    - ❑ It is not permitted, in commercial operations or otherwise, for the purpose of profit to promote participation in unlawful lotteries arranged within the country or in lotteries arranged outside the country
    - ❑ License is required and advertising is subject to the 1995 Marketing Act and Code of Conducts

# Conclusion

## ➤ Current situation

- ❑ Advertising only is possible for authorized games or lotteries
- ❑ The *status quo* is maintained
- ❑ Traditional land-based legislation adequate?

## ➤ Online gaming is a different game

- ❑ By its proper nature it has a cross-border impact
- ❑ Different and International approach is required
- ❑ European Commission declared in 1992 that it would not take an initiative, but could not exclude this in the future
- ❑ State lotteries are lobbying to maintain the *status quo*
- ❑ The Industry ?